IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JAIPUR BENCH, JAIPUR

ORDER
::
S.B. Sales Tax Revision Petition No. 505/1999

Commercial Taxes Officer, Sikar (Rajasthan)

Versus

M/s. Shri Balaji Udyog, Sikar & Anr.
::

Date of order :: August 30, 2007

REPORTABLE

PRESENT
HON'BLE DR. JUSTICE VINEET KOTHARI

Mr. R.B. Mathur for the petitioner-Revenue
Mr. R.C. Agarwal & Mr. Pramod Agrawal for the respondent-assessee

BY THE COURT:

1. This revision petition has been filed by Revenue against the order of the Tax Board dated 03.03.1999, whereby the Tax Board allowed the appeal of the assessee and set aside the impugned order of the District Level Screening Committee (for

short, 'DLSC', hearinafter) dated 23.07.1998, whereby the DLSC had revoked the exemption certificate granted to the respondent assessee under the Sales Tax Incentive Scheme, 1987 on 16.08.1995.

2. The DLSC revoked the exemption granted to the respondent assessee unit on the basis of Clause 2(a)(ii) of the Notification dated 23.05.1987 containing the aforesaid Sales Tax Incentive Scheme, 1987, which reads as under:-

> *"2. Definitions.- (a) "New Industrial Unit" means an industrial unit which commences commercial production during the operative period of the Incentive Scheme but will not include,-*
>
> *(i) an industrial unit established by transferring or shifting or dismantling* ***an existing industry;*** *and*
>
> *(ii) an industrial unit established on the site of an existing unit manufacturing similar goods;*
>
> ***Explanation.-*** *Date of commencement of commercial production means the 61st day after the day on which the raw material is, for the first time, put in the process of production including trial production."*

3. By the impugned decision dated 23.07.1998, which is reproduced in the order of the Tax Board, the DLSC found that despite notice in this regard to the respondent assessee, since it has not filed any reply to the notice and it was not entitled to the benefit of the incentive scheme as a sick unit under the 1987 Scheme, though it may be entitled for the benefit as a sick unit under Clause 2(b)(iii) under the Sales Tax Incentive Scheme, 1989, it could apply under the 1989 Scheme. However, its eligibility under the 1987 scheme was not found to be there and accordingly, the exemption certificate was revoked.

4. The case of the petitioner Revenue in this Revision Petition is, however, different: that at the site of the industrial unit of the present respondent assessee, there was already an industrial unit in the name of M/s. Mahavir Granites, which was manufacturing granite tiles and the said unit was sold to the present respondent assessee M/s. Balaji Udyog in private negotiations and since the land in question belonged to RIICO

on lease to M/s. Mahavir Granites, the said lease was got transferred or mutated in favour of the present respondent assessee and a fresh lease deed was executed by RIICO in favour of the respondent assessee on 07.03.1995. In pursuance of this, consent was given by the RIICO vide letter No. 3392 dated 28.02.1995, Annexure-R-2 on record. The Revenue urged before this court that since the unit to which the exemption was earlier granted by DLSC was located at the same place or site where the earlier unit manufacturing similar goods, namely granite tiles, was already working, the present respondent assessee was not a new industrial unit covered by the definition of Clause 2(a)(ii) of the said incentive scheme and therefore, it was not entitled to be granted the benefit of the said incentive scheme.

5. Mr. R.B. Mathur, learned counsel for the Revenue relied upon the decision of the Hon'ble Supreme Court in the case of *State Level Committee & Anr. Vs. Morgardshammar India Ltd.* reported in (1996) 101 STC 1 (SC), in which case the Hon'ble

Supreme Court was dealing with a case of exemption under Section 4-A of the U.P. Sales Tax Act, 1948 and observed that "a "new unit" is that where such a unit does not use "machinery, accessories or components already used or acquired for use in any other factory or workshop in India". Clause (a) of Explanation (i) to Section 4-A(2) uses both the expressions "already used" and "acquired for use" in any other factory or workshop in India. Both the expressions cannot mean one and the same thing. It is a disqualification if the new factory or workshop uses machinery/accessories/components already used in any other factory or workshop in India. It is equally a disqualification if it uses machinery/accessories/ components which were acquired for use in any other factory or workshop in India. The words "acquired for use" must be understood in their plain and ordinary meaning. It is enough that the machinery/accessories/components which are used in the factory or workshop (claiming the benefit of section 4-A) are acquired for use in another factory or workshop in India. It is not necessary to go further and enquire whether the

machinery/accessories/components were actually used in any other factory or workshop in India".

In the light of the aforesaid legal position, the Hon'ble Court held that since part of the machinery acquired by the respondent for setting up its factory was purchased from MS, which the MS had acquired for use in a factory or workshop proposed to be set up by it but was not set up as their project did not materialise and such machinery purchased by MS was lying in unpacked and unused condition. The respondent assessee applied for an eligibility certificate under Section 4-A. The State Level Committee rejected the application on the ground that part of the machinery used in setting up the respondent's unit was "acquired for use in any other factory or workshop in India". The State Level Committee also rejected a review application. The High Court, however, allowed the writ petition of the assessee and set aside the order of rejection and remitted the matter back to the State Level Committee with a direction to re-examine the material on record and to reach a

categorical finding as to whether or not the machinery purchased from MS actually used in any other factory or workshop in India and that if it fund that the machinery was not actually used in any factory before its installation in the respondent's unit, the respondent's unit would be entitled to be treated as a “new unit” for the purposes of section 4-A. The Supreme Court, however, reversing the decision of the High Court held that the respondent assessee was not entitled to exemption under Section 4-A in such circumstances.

6. As against this, learned counsel for the respondent assessee relied upon the judgment of the Hon'ble Supreme Court in the case of ***Commissioner of Sales Tax Vs. Industrial Coal Enterprises*** reported in (1999) 114 STC 365 (SC), in which case, after distinguishing the aforesaid decision of the Hon'ble Supreme Court in the case of *State Level Committee & Anr. Vs. Morgardshammar India Ltd. (supra), held as under :-*

> *Held, dismissing the Revenue's appeal, that admittedly the respondent assessee fulfilled the relevant conditions at the time when it applied for exemption as its*

capital investment did not exceed Rs. 3 lakhs. Under the notification dated January 29, 1985, the period of exemption in the case of units with capital investment not exceeding Rs. 3 lakhs was four years. Such period was to be reckoned from the date of first sale. Neither the section nor the notification contained any condition that if the capital investment of the unit exceeded Rs. 3 lakhs after the grant of exemption, such exemption would cease to operate unless and until the conditons prescribed for units having capital investment exceeding Rs. 3 lakhs were fulfilled. In the absence of such express provision the exemption granted to the respondent from August 9, 1985 when it fulfilled all the prescribed conditions would not cease to operate just because the capital investment exceeded the limit of Rs. 3 lakhs on account of the respondent becoming the owner of the land an building to which the unit was shifted. The shifting only made it much more convenient and easier for the respondent to carry on the production of the goods undisturbed by the vagaries of the lessor and without any necessity to spend a part of its income on rent. No mala fides were pleaded on the part of the respondent in obtaining exemption in the first instance as a unit with a capital investment below Rs. 3 lakhs and increasing the capital investment subsequently to an amount exceeding Rs. 3 lakhs with a view to defeat the provisions of any of the relevant statutes.

A provision granting incentive for promoting economic growth and development in taxing statutes should be liberally construed and restriction placed on

it by way of exception should be construed in a reasonable and purposive manner so as to advance the objective of the provision. The object of granting exemption from payment of sales tax has always been for encouraging capital investment and establishment of industrial units for the purpose of increasing production of goods and promoting the development of industry in the State."

7. In view of the aforesaid two decisions of equal strength of 2 judges, a 3 judges bench of the Hon'ble Supreme Court recently considered both the aforesaid judgments in the case of ***Polycan Industries Vs. Commissioner of Trade Tax, U.P. Lucknow*** reported in (2006) 5 Vat Reporter 5 and observed as under :-

"6. After this appeal was admitted, a conflict between the decisions of this Court in the case of State Level Committee V. Morgardshammar India Ltd. (1996) 1 SCC 108 and in the case of Commissioner of Sales Tax V. Industrial Coal Enterprises (1999) 2 SCC 607 was noticed. The matter was thus referred to a 3-Judge Bench in order to consider whether the above-mentioned provision should receive a strict or a liberal interpretation. It is, therefore, before this Bench.

7. Having heard parties and perused the documents, we are of the view that the interpretation must be in accordance with the wording of the provision. As stated

above, the relevant wordings are "on land or building or both". A plain and simple reading of these words indicates that to avail of the exemption, even presuming the term "owned" means "actually owning", the ownership could be either of the land or the building or of both. Therefore, the decisions of the Tribunal and the High Court which proceeded only on the basis that the land was not owned would not be correct. It would also have to be considered whether or not the building was owned by the appellant.

8. The appellant claims that they own the building. On behalf of the respondent it is stated that this question has not been looked into and therefore at this stage it is not possible to state whether or not the building was owned by the appellant. Further the other points on which exemption had been denied will also require looking into.

9. The committee has not stated anything on the aspect of building being owned by the appellant. The Committee had also not given to the appellant an opportunity of being heard. The Tribunal and the High Court have not looked into the other aspects raised by the Committee and not considered whether building was owned by the appellant. We, therefore, feel that the correct course would be to remit the matter back to the Committee for consideration on merits. We accordingly do so. Amongst other things the Committee will also consider whether or not the building is owned by the appellant. The Committee will

grant to the appellant an opportunity of being heard.

10. With these directions, the appeal stands disposed of. There will be no order as to costs."

8. That another learned Single Judge of this court had occasion to deal with a similar controversy as is arising in the present matter, in ***Commercial Taxes Officer, Rajsamand Vs. Ganpati Marbles & Granites Pvt. Ltd.*** reported in (2007) 8 Vat Reporter 8. The decision of the Tax Board in Ganpati Marble's case which gave rise to the aforesaid sales tax revision petition of Revenue decided by this court was in fact relied upon by the learned Tax Board in the impugned decision in the present case of M/s. Balaji Udyog. This court in *Ganpati Marbles & Granite Pvt. Ltd.* case (supra) has very lucidly interpreted clause 2(a)(ii) of the Sales Tax Incentive Scheme, 1987 in the following terms :-

18. Sub-clause (ii) of clause 2(a) of the Scheme of 1987 makes the industrial unit disqualified from claiming benefit under the Scheme of 1987 provided the said industrial unit is established on the sit of "an existing industrial unit manufacturing similar goods." Clause (ii) is required to be considered again because of the reason that it is not in

*dispute that non-petitioner's industrial unit has been established on a plot or property over which erstwhile owner's industry Shrinath Marbles and Minerals was running and was doing the marble block cutting. The learned counsel for the petitioner tried to submit that any land or industrial property incurs disqualification once that land had been put to use for manufacturing the goods and other person establishes industrial unit for manufacturing the similar goods as of vendor. The interpretation given by the revenue cannot be accepted because of the simple reason that **sub-clause (ii) of clause 2(a) of the Scheme of 1987 has not provided for disqualification to be applied over the immovable property in perpetuity** so as to deny the tax exemption benefit to any person who establishes entirely a new unit manufacturing the similar goods which was manufactured by the erstwhile industrial unit long ago or before new unit was established.*

*19. Such interpretation is not coming directly or indirectly from the language of sub-clause (ii) of clause 2(a), **nor it could have been the intention of the legislature to declare the immovable property as disqualified for ever** for giving any benefit to any subsequent dealer or the owner of the industrial unit. The plain and simple meaning of sub-clause (ii) of clause 2(a) is that if on an existing unit manufacturing similar goods, another industrial unit is established, then that industrial unit cannot claim benefit of the Scheme of 1987 and obvious reason is that the expansion of*

*existing running industrial unit is not included in the definition of "New Industrial Unit". The word "manufacturing similar goods in sub-clause (ii) is relevant and significant. The word "manufacturing" denotes the continuity of running of industrial unit and it cannot mean that "once goods were manufactured on the premises". **There cannot be any reason for holding that** once goods are manufactured on one land or on one immovable property and that unit closed down and the Industry extinguished then **disqualification will continue on the land and building irrespective of its owner**. Therefore, mere establishing industrial unit on the land which was land of other owner and which was manufacturing goods similar to the goods manufactured by purchaser, the subsequent dealer will not be eligible to benefit of the exemption merely because of its location on the land of old unit which was manufacturing the same goods.*

*20. At this juncture it will be worthwhile to mention here that in the case of the **State Level Committee v. Morgadshammar India Ltd. (supra)** that one M/s Modi Steels purchased the machinery and established a factory. According to the dealer of that case, M/s Modi Steels had not put the said machinery to any use and that was purchased by the dealer of that case who was seeking exemption of the tax under section 4-A of the U.P. Sales Tax Act. The Hon'ble Apex Court held that the enquiry about actual use of that machinery by the vendor M/s Modi Steels is not permissible and it cannot be enquired whether that machinery was in fact used by M/s Modi*

Steels or not. ***The different language used in U.P. Act is clear*** *and it has been specifically provided that if machinery has been acquired for other industry, the benefit will not be given to purchaser of that machinery even if the machinery has not been used by original purchaser.* ***Contrary to it, the facts of this case*** *reveal that the proprietor of the vendor industrial unit clearly stated that he had a marble cutting machine for which he described that machine as 'Deshi'. He stated that said marble machine was purchased by him in the year 1980, 14 years ago from establishing the unit by the non-petitioner. The cost of the said machine was less than Rs. Two lacs or about Rs. Two lacs. The alleged industrial unit has not electric connection since the year 1982. From the statement which was relied upon by the revenue and which was of the proprietor of Shrinath Marbles and Minerals, it is also reveled that according to him the factory was closed four months before the sale of the unit. Though complete facts are not on record but from the reasons given in the order of the Tax Board, it is clear that the District Collector allotted the land to the non-petitioner unit and the non-petitioner unit invested more than Rs. 651 lacs. Admittedly, the non-petitioner unit's partners/proprietor have no family relation of the proprietor of the earlier industrial unit. When the Collector intervened and transfer was affected with the sanction of the District Collector, then as per the guidelines issued by the Commissioner, Commercial Taxes dated 18.6.1992, the sale of the land and building and machinery of*

Shrinath Marbles and Minerals by the RIICO and as per Condition No. 3, the fact came on record was that earlier unit was not running unit and as per clause (4) of the said guidelines issued by the Commissioner, Commercial Taxes dated 18.6.1992, the non-petitioner installed its own machinery.

21. Apart from above, it will be worthwhile to mention here that neither the District Level Committee nor the State Level Committee held that at the time of sale, the industrial unit of Shrinath Marbles and Minerals was running and the running industrial unit was sold to the non-petitioner. It appears that the claim of non-petitioner was rejected ignoring basic and fundamental facts about establishing the new industrial unit and that too, without considering the guidelines issued by the Commissioner, Commercial Taxes dated 18.6.1992 and without obtaining guidelines which were sought by the State Level Committee from the Director of Industries, therefore, on this ground also of non-consideration of documents, the order of the District Level Committee as well as the decision of the State Level Committee could not have been sustained by the Tax Board.

22. In view of the above reason, I do not find any merit in this revision petition and the same is hereby dismissed.

Thus, this court distinguished the aforesaid ruling of the Hon'ble Supreme Court in the case of *Morgardshammar India*

Ltd. (supra) and has held that manufacturing of similar goods in an industry at a particular site does not affix that particular site with permanent disqualification or ineligibility and if a subsequent different owner with a new investment in plant and machinery comes up at the same site for manufacture of even similar goods, still such subsequent industrial unit can be allowed the benefit of incentive scheme, 1987.

9. In the present case, it is not in dispute that the earlier unit of M/s. Mahavir Granites was manufacturing granite tiles, a product similar to that of the present assessee M/s. Balaji Udyog, however, it is equally true that the benefit of exemption was given to the present respondent assessee only in respect of the new investment made by it in the new plant and machinery purchased by it and not in respect of cost of land and building which was purchased by it from the erstwhile unit of M/s. Mahavir Granites. The additional fact which enures to the benefit of the respondent assessee in the present case is that it has already been granted the benefit of exemption on an

earlier occasion by DLSC itself after fully considering its facts on 16.08.1995 and after the lapse of approximately three years, the said decision was revoked almost by an ex parte order, though a notice in this regard is said to have been served on the respondent assessee. This appears to have been done on some audit objection raised as the impugned order of the Tax Board dated 03.03.1999 itself indicates.

10. Learned counsel for the respondent assessee has relied upon the decision of the Hon'ble Supreme Court in the case of *Indian and Eastern Newspaper Society Vs. Commissioner of Income Tax, New Delhi* reported in (1979) 119 ITR 996 (SC), wherein the Hon'ble Supreme Court has held that the opinion of an internal audit party of the Income Tax Department on a point of law cannot be regarded as “information” within the meaning of Section 147(b) of the Income Tax Act, 1961, for the purpose of reopening an assessment. Although an audit party does not possess the power to pronounce on the law, it nevertheless may draw the attention of the ITO to it. Law is

one thing, and its communication another. That part alone of the note of an audit party which mentions the law which escaped the notice of the ITO constitutes “information” within the meaning of Section 147(b); the part which embodies the opinion of the audit party in regard to the application or interpretation of the law cannot be taken into account by the ITO and the ITO himself must determine what is the effect and consequence of the law mentioned in the audit note which escaped his notice while making the original assessment. Similar view was expressed by the Hon'ble Supreme Court in the case of *Commissioner of Income Tax Vs. Lucas T.V.S. Ltd.* reported in (2001) 249 ITR 306 (SC) following the aforesaid view taken in *Indian and Eastern Newspaper Society* case (supra).

11. Learned counsel for the Revenue has further drawn attention of the court towards some of the judgments wherein this court as well as Rajasthan Taxation Tribunal had held that eligibility certificate once granted under the incentive scheme,

cannot be revoked with retrospective effect so as to deprive the assessee of the benefit already availed by it under a validly granted eligibility certificate in its favour. He referred to following judgments:

1. Commissioner, Commercial Taxes, Rajasthan & Anr. Vs. Kandhari & Kandhari Pvt. Ltd. & Anr. reported in (1999) 113 STC 361 (RTT)
2. Kitchen Aid Vs. State of M.P. & Ors. reported in (1995) 110 STC 109 (M.P.)

3. CTO Vs. Prakash Udyog Oil Mill reported in (1997) 20 Tax World 585 (RTT)

4. CST Vs. Elopic Paper Convertor reported in (1997) 104 STC (Journal) 2 (S.C.), SLP dismissed

12. Having considered the rival submissions and having carefully gone through the judgments cited at the bar, this court is of the opinion that there is no force in the revision petition filed by the Revenue in the the present case against the order of the Tax Board, whereby the Tax Board allowed the benefit of Incentive Scheme, 1987 to the respondent assessee and held that the respondent assessee cannot be denied the status of new industrial unit under Section 2(a) of the Act. The judgment of this court in the case of Ganpati Marbles &

Granites Pvt. Ltd. (supra) clearly supports the respondent assessee because the disability or disqualification cannot be said to have permanently attached with the land and building owned by the erstwhile M/s Mahavir Granites and therefore, even if the new business was started with the new investment made by the respondent assessee M/s. Balaji Udyog for manufacture of similar goods, it could not be denied the benefit of incentive scheme. Moreover, once the exemption was granted to the respondent assessee, the same could not have been revoked with retrospective effect on a mere audit objection, as has been done in the present case. Thus, the Eligibility Certificate granted in favour of the respondent assessee would stand revived and if the assessee has already availed the benefit under the eligibility certificate, that would not be disturbed and if he has not availed the same, he would be entitled to avail the same now to the extent of unavailed amount of eligible investment.

13. Consequently, this revision petition filed by the Revenue

is dismissed with no order as to costs.

(Dr.VINEET KOTHARI),J.

Pramod
Item No. 1